UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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January 22, 2010

Ref: EPR-EP

Michael C. Jewell
Regulatory Branch Chief
Sacramento District
U.S. Army Corps of Engineers
1325 J Street, Room 1480
Sacramento, CA 95814

RE: Public Notice SPK-2009-01427
Ute Water Conservancy District

Dear Mr. Jewell:

The Environmental Protection Agency Region 8 (EPA) has reviewed the referenced U.S. Army Corps of Engineers' (Corps) Public Notice regarding authorization pursuant to Clean Water Act (CWA) Section 404 to discharge dredged and fill material in waters of the United States, including wetlands, in conjunction with the proposed expansion of Hunter Reservoir located in Mesa County, Colorado. The proposed project of Ute Water Conservancy District (Ute Water) will result in increasing the surface area of the reservoir from 19 acres to 80 acres with a corresponding increase in storage capacity of 1230 acre feet. Increased water levels will adversely impact 32 acres of high quality montane wetlands, including a rare and unique 2-acre fen and adjacent peatland and wet meadow complex.

The EPA's opinion, based on currently available information, is that the Hunter Reservoir Expansion project as proposed *may have substantial and unacceptable impacts to aquatic resources of national importance* (ARNIs).[1] These comments are being sent consistent with Part IV 3(a) of the Clean Water Act Section 404(q) Memorandum of Agreement between the EPA and the Department of Army. These comments are also intended to express additional Agency concerns which we believe should be addressed in future National Environmental Policy Act (NEPA) documentation and considered in future permit decisions. You should note that EPA's concerns are consistent with those we have raised since the beginning of the project.

[1] EPA previously identified the wetlands in the Hunter Reservoir project area to be ARNIs in our September 17, 2007 letter to the U.S. Forest Service and the Corps rating the Forest Service's Draft Environmental Impact Statement (DEIS) for the project. We have attached this letter and incorporate by reference our comments in that letter as part of our comments on the application for authorization to place dredge and fill material into waters of the U.S. in accordance with Clean Water Act Section 404.

The numerous early coordination meetings and discussions with the U.S. Forest Service prior to the DEIS, as well as the attempted dispute resolution process and subsequent coordination meetings with the Forest Service and Corps, clearly demonstrate our commitment to resolving the environmental concerns associated with this proposed project. Our detailed review of this proposed project can be found in Table 1 (attached). Despite our efforts, it appears the applicant has chosen to separate the federal permit actions and apply for a CWA Section 404 permit separate from the Forest Service's special use permit and associated Forest Service NEPA analysis. As you know, the environmental impacts of the proposed project were considered significant by the Forest Service, and a finding of no significant impact (FONSI) could not be justified based on scoping comments and/or similar projects requiring EISs. EPA believes that segmenting the federal decisions is inappropriate as it is duplicative and results in time delays, especially given the time and resources all relevant agencies have provided to date to evaluate the project. Although EPA disagrees with segmenting the federal decisions, just as EPA has worked diligently in the past to facilitate resolution of these NEPA and 404 deficiencies, we will reengage in the NEPA process as a cooperating agency with the Corps of Engineers.

EPA rated the Forest Service DEIS for the Hunter Reservoir Expansion Project as "Environmentally Unsatisfactory – Inadequate Information" (EU-3) in accordance with EPA's rating system for draft environmental impact statements. This rating was based on our assessment that that the document did not fully evaluate an adequate range of alternatives, did not fully consider and assess avoidance and minimization of impacts to wetlands, and did not provide sufficient mitigation to adequately replace the aquatic resource functions that would be lost under the proposed action. In an attempt to resolve the issues related to EPA's EU-3 rating on the DEIS, EPA hired a third-party facilitator to convene a mediated process with the Forest Service, Corps and EPA. The Corps withdrew from this process, stating it was premature to conduct the NEPA analysis until Ute Water submitted a CWA Section 404 permit application. The EU-3 rating on the DEIS has never been resolved; therefore, the DEIS continues to be a candidate for referral to the Council on Environmental Quality if resolution cannot be achieved.

The new information provided with the CWA Section 404 permit application does not appear to meet NEPA or CWA requirements. EPA continues to believe the project will have unacceptable impacts to the aquatic environment, and therefore the Corps needs to prepare a supplemental NEPA/Clean Water Act Section 404(b)(1) Guidelines analysis in order to comply with both NEPA and Clean Water Act and the statutes' implementing regulations.

Alternatives – 40 C.F.R. § 230.10(a)

The CWA Section 404(b)(1) Guidelines require that no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. 40 C.F.R. § 230.10(a). An alternative is practicable if it is available and capable of being done, taking into consideration cost, existing technology, and logistics in light of overall project purposes. 40 C.F.R. § 230.10(a)(2). If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded, or managed in order to fulfill

the basic project purpose of the proposed activity may be considered. *Id.*

The Alternatives Screening Report (ASR) provided with the Corps' public notice for the Hunter Reservoir Expansion project permit examined 16 water supply and storage alternatives, nine from the Forest Service DEIS, and an additional seven alternatives that we believed may be reasonable and practicable alternatives for a portion of the project proponent's water supply. EPA agreed on the final list of 16 alternatives; however, we continue to have significant concerns regarding the further development of one of the critical alternatives (i.e., regional water supply), the screening criteria, and elimination of alternatives that may still be considered practicable under the Guidelines. We do not believe the ASR sufficiently addresses the Guidelines regarding alternatives analysis.

EPA disagrees with the Corps' ultimate conclusion that there are no other practicable alternatives to the expansion of Hunter Reservoir. The Corps states that the purpose and need of the project is long term—to meet Ute Water's projected increase in future water demand by 2045. The expansion of Hunter Reservoir will provide approximately 9% of this projected increase in demand over the next 35 years (1230 acre feet resulting from Hunter Reservoir expansion divided by 14,000 acre feet approximate total increase in water demand). Thus, Ute Water must secure over 90% of this additional water from other projects. Accordingly, the Corps acknowledges that Hunter Reservoir is one of several potential water supply projects that Ute Water is pursuing in the immediate future, as it stated that "[s]ince applying for enlargement of Hunter Reservoir, and during the preparation of the EIS, Ute Water has sought other opportunities to increase its raw water supply and will continue to do so for the foreseeable future." (Page 7, ASR). Yet, the Corps concludes that no other alternative is practicable. So, in essence, the Corps' conclusion is that there is no foreseeable and practicable way at this time for Ute Water to build the water supply projects that will be necessary to meet 90% of its projected future water demand over the next 35 years. In other words, the Corps concludes that only this one small piece of Ute Water's 35-year water supply puzzle is "available and capable of being done after taking into consideration cost, existing technology, and logistics." This information fails to explain critical environmental concerns about future water supply projects in the basin and exactly how Ute Water plans to meet the other 90% of its projected increase in water demand. It also points to a critical concern about why Ute Water is seeking to develop other water supplies now and in the foreseeable future, if the only practicable project is at Hunter Reservoir.

Regarding the alternatives considered by the Corps in the ASR, the ASR purpose and need (P&N) section contains the DEIS P&N statement that EPA worked with the Forest Service over years to develop, such that the DEIS would cover an appropriate range of reasonable and practicable alternatives that would meet the basic project purpose and need, and avoid impacts to this aquatic resource consistent with the provisions of NEPA and the CWA Section 404(b)(1) Guidelines. Unfortunately, the DEIS failed to accomplish this requirement. The ASR also does not meet the requirements of NEPA and Clean Water Act Section 404.

The basic/overall project purpose is to provide a portion of Ute Water's projected future increase in water demand. Alternatives should be eliminated based on practicability factors

(cost, existing technology, and logistics) and not the applicant's specific goals and project objectives. If an alternative is considered a standard industry norm, then we believe it should be considered a practicable alternative. For example, other water providers have built pipelines from other basins, or transferred water diversion points to other basins through court decrees, in order to supply their treatment plants. In addition, the ASR states "that any new supplies to the system must meet these criteria to be considered of sufficient quality." (Page 8, ASR). We disagree with this assertion, as many municipalities and communities have less stringent standards for aesthetic water quality concerns and take action to mitigate the impacts of these secondary standards. The two drinking water standards (TDS and hardness) discussed in the ASR are simply goals of Ute Water rather than practicability factors upon which to eliminate alternatives. TDS and hardness are secondary standards for drinking water (based on taste, odor, color, etc.) which are not enforceable standards by EPA, as they do not impose human health risk. While we understand the desire to maintain high standards for drinking water, the alternatives analysis should not eliminate less damaging practicable alternatives when many options exist including, but not limited to, improved water treatment of components adding to TDS, blending of water supplies to maintain TDS levels, and the control of hardness through water softeners.

Also, as discussed below, the Corps proposes to partially mitigate the impacts to the wetlands at Hunter Reservoir by restoring wetlands at Jensen Reservoir. The Draft Wetland Mitigation Plan (DWMP) states that Ute Water purchased the easement at Jensen Reservoir in April 2009, which gave Ute Water the right to expand the reservoir by approximately 8 acres. (Page 5, DWMP). If Ute Water purchased this easement at Jensen Reservoir in April 2009 and the ASR was not completed until September 2009, why did the ASR not include the expansion of Jensen Reservoir in the alternatives analysis?

Further, the ASR states that the enlargement of Hunter Reservoir would allow Ute Water to perfect additional water rights and make beneficial use of its existing and conditional water rights in Leon Creek. EPA worked with the Forest Service to avoid limiting alternatives to water rights in Leon Creek. Water rights are considered vested property rights and can be transferred or conveyed in the same manner as property rights. Water rights and diversion points are commonly transferred or exchanged through the State of Colorado water court as a common industry practice. Ute Water is currently proposing water transfers to expedite Hunter Reservoir expansion. Location of existing water rights and exercising of conditional water rights at Hunter Reservoir should not be used to eliminate less damaging practicable alternatives unless the applicant clearly demonstrates otherwise.

The additional alternatives and screening criteria developed after the DEIS again eliminated all potential water storage or supply options to identify Hunter Reservoir as the least environmentally damaging alternative (LEDPA). Despite the development of more detailed screening criteria, the Corps has again failed to screen alternatives based on the Guidelines regarding "less damaging practicable alternatives in light of the basic/overall project purpose." The screening criteria and alternatives include the applicant's specific project purposes, wishes, and unsubstantiated cost/financial consideration to ultimately identify Hunter Reservoir as the preferred project. To identify all of the failures of the screening criteria would require extensive

case-by case evaluation. Again, alternatives that can be obtained, utilized, expanded, or managed may be considered available even if not presently owned by the applicant. *See* 40 C.F.R. § 230.10(a)(2). The following example is provided for your consideration regarding flawed alternative development and screening criteria:

Construction of a Regional Water Storage Reservoir. The Corps added constraints to this alternative that were not identified in our original alternative recommendation in our comments on the DEIS—that is, a regional water supply storage project to create on-channel or off-channel reservoirs for future needs in one location. We did not ask for a regional system based on a merger of water supply systems in the Grand Valley or their collaboration on a unified strategic plan for water development in the Grand Valley. The Corps' initial screening eliminated this alternative based on the following constraints: (1) no site for such a reservoir has been identified, (2) no source of water has been identified, and (3) the Corps considered it impossible to determine whether the technical or logistical criteria could be met. This alternative has been mischaracterized and then eliminated based on the additional constraint of a collaborative water supply system. We continue to believe that a larger regional storage project may be available to the applicant and may be less damaging and practicable.

Significant Degradation of Waters of the U.S. – 40 C.F.R. § 230.10(c)

The CWA Section 404(b)(1) Guidelines provide that no discharge of dredge or fill material shall be permitted which will cause or contribute to significant degradation of waters of the United States. 40 C.F.R. § 230.10(c). Findings of significant degradation related to the proposed discharge are to be based upon appropriate factual determinations, evaluations, and tests. *Id.* Further, the determination of the effects of each proposed discharge must include a determination of the cumulative and secondary effects on the aquatic ecosystem. 40 C.F.R. § 230.11(g),(h).[2] Council on Environmental Quality (CEQ) regulations at 40 C.F.R. § 1508.7 define a cumulative impact as:

> the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.[3]

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[2] Corps regulations independently require an assessment of cumulative impacts before issuing a permit. See 33 C.F.R. §320.4.

[3] The term "foreseeable," when used to describe an environmental impact, is "properly interpreted as meaning that the impact is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." Sierra Club v. Marsh, 976 F.2d 763, 767 (1st Cir. 1992). Here, a reasonably prudent person would have no difficulty seeing the connection between the proposed water supply expansion and future water supply proposals that will follow.

From this definition of cumulative impacts two things are apparent. First, it does not matter who will be responsible for the cumulative impacts of development that will occur in, around, and because of a proposed project. Associated impacts resulting from future water supply development is absolutely foreseeable as detailed in the ASR (399 additional acre feet needed per year, 27,000 additional acre feet needed by 2045). Indeed, the project proponents have met with the Corps and the Forest Service more than once and discussed water supply development plans (including the recent 1300 acre feet expansion of the Jerry Creek Reservoir # 2, with associated wetland impacts) and the potential for additional aquatic resource losses with future water supply development on the Grand Mesa. Additional water supply development impacts may also be caused by entities other than the project proponent. It is the responsibility of the regulatory agencies to review and evaluate all of these impacts.

Second, the definition of cumulative impacts clearly recognizes that even minor impacts may have significant environmental effects over time. Historically, impacts due to water supply development on the Grand Mesa have undoubtedly been significant. That is of course why CEQ regulations direct the permitting agency to consider the associated cumulative impacts, past, present, and future.

Mitigation – 40 C.F.R. § 230.10(d)

The CWA Section 404(b)(1) Guidelines provide that no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps are taken that will minimize potential adverse impacts of the discharge on the aquatic ecosystem. 40 C.F.R. § 230.10(d). EPA believes the proposed mitigation for the unavoidable adverse impacts resulting from the proposed project is inadequate and that the assessment methodology employed by the Corps is problematic. Mitigation by attempting to restore fens at Jensen Reservoir does not take into consideration the large peatland complex associated with the fen-type wetland complex.

The Draft Wetland Mitigation Plan (DWMP) developed by Westwater Engineering incorporates the Grand Mesa Wetland Function and Value Assessment (Grand Mesa Method). We reviewed and commented on the assessment method in detail to the Forest Service clarifying our comments on the DEIS (letter dated March 27, 2008, attached). We do not concur with the use of this method. In the absence of an agency coordinated and approved functional assessment methodology, we believe that the Corps should also evaluate the impacts on an acreage basis with a minimum mitigation ratio of 1:1, as has been done with the Colorado FacWet functional assessment method.

Also, the wetland restoration/reestablishment associated with the proposed road improvements would likely be necessary for adequate access during construction of the project and should be considered incidental to the project. Improvements to aquatic resources from these new stream crossings and proposed road abandonment improvements to wetland resources are minimal when compared to the overall wetland impacts proposed (32 acres). The acreages of these proposed improvement areas are not even provided in the report, but are simply characterized as 16 wetland and waters of the U.S. crossings. (page 4, DWMP).

Another concern regarding proposed mitigation credits for this project is the reestablishment of riparian wetlands on the NFSR 280, as this road would be abandoned to construct a new road into Hunter Reservoir. Our concern is that this existing road could be managed by the Forest Service to reestablish these wetlands with or without the proposed project, and that minor wetland impacts currently exist in this slope/riparian wetland restored. (photos 1 - 2, page 4, DWMP). The actual area of wetland loss at these minor, disturbed wetland areas are not provided in the report. The amount of wetland mitigation provided by moving the road to a new location is relatively small considering the large wetland loss associated with the proposed reservoir expansion. Again, the construction traffic proposed for the project will require improved road conditions for heavy equipment and improved stream crossings, and are thus an incidental and necessary part of the project.

Further, the DWMP's planned mitigation at Jensen Reservoir is problematic. The DWMP states that Jensen Reservoir was likely entirely wetlands before construction of the dam and dike in the 1900s, and that today extensive wetlands surround the reservoir. (page 5, DWMP). A fen shoreline currently exists along the southwest bank of Jensen Reservoir and "[a]ccumulations of peat extend into the reservoir along the southwest shoreline; however, vegetation ceases to exist beyond the Ordinary High Water Mark." *Id.* The Corps considers it likely that a large portion of Jensen Reservoir was once a fen. *Id.* Ute Water proposes to mitigate the Hunter Reservoir expansion, in part, by (1) permanently foregoing its right under the 1891 easement to expand Jensen Reservoir by eight acres, to its approved level of 37.9 acres, and (2) lowering Jensen Reservoir's existing water levels to re-establish 29 additional acres of wetlands, including 10 acres of potential fen (page 5, Public Notice of Permit Application). The Corps estimates that lowering the water level of Jensen Reservoir will re-establish 5 acres of fen "within a reasonable time frame." (page 12, DWMP). Further, the Corps states that mitigated wetlands at Jensen Reservoir, apparently including the re-established fen, will be fully functioning within 5 years—"In 5 years, Jensen [Reservoir] . . . will be functioning at [its] estimated functioning capability and functions will be fully restored in the watershed." (page 5, DWMP).

Both aspects of the proposed mitigation at Jensen Reservoir are problematic. First, the Corps proposes to mitigate the Hunter Reservoir expansion by foregoing Ute Water's right to expand the reservoir to 37.9 acres and by relinquishing the Jensen Reservoir easement back to the Forest Service (essentially preserving the site). The mitigation rule regulations provide for mitigation by wetland preservation when five criteria are met—one of which is that "[t]he resources are under threat of destruction or adverse modifications." *See* 33 C.F.R. § 332.3(h)(iv). Here, the only threat to the 8 acres of wetland surrounding the current Jensen Reservoir is under Ute Water's direct control. As the Corps' mitigation rule contemplates, an applicant for a 404 permit should not be able to mitigate its impact to wetlands by purchasing additional wetlands, threatening to destroy these wetlands too, but choosing instead to "preserve" these other wetlands. In addition, beyond the issue of Ute Water's control of the threatened destruction of wetlands, the Corps must determine that the Jensen Reservoir wetlands face a threat of destruction or adverse modifications. There is no indication that other land use changes in the watershed threaten the eight acres of Jensen Reservoir at issue, and the Corps also states that

after relinquishment of the easement to the Forest Service, no future proposal to establish a new reservoir there would be likely to obtain a permit. (Page 5, Public Notice of Permit Application). In summary, the only demonstrable threat to Jensen Reservoir's existing wetlands is under the direct control of Ute Water, and thus not all of the criteria of 33 C.F.R. § 332.3(h) have been met.

The second component of the Jensen Reservoir mitigation is to drain the reservoir and create additional wetlands. As noted above, the Corps' mitigation plan is premised, in part, on the assumption that this will re-establish 5 acres of fully functioning fen within a reasonable time, or 5 years. (Figure 13, DWMP). This assumption that fen will be re-established at Jensen Reservoir is directly contrary to EPA's earlier comments that "[f]ens . . . often take thousands of years to develop" and that "attempting to create a fen to replace those that are destroyed is not practicable." (Page 2, EPA DEIS comment letter). The time lag and uncertainty associated with the reestablishment of this fen is a concern, as it is unlikely that the fen reestablishment at Jensen Reservoir will provide a similar function and value as the fen and peatland complex at Hunter Reservoir.

Summary

In view of the concerns presented above, including the failure to seek and analyze less damaging practicable alternatives, to adequately determine the potential to cause or contribute to significant degradation of waters of the U.S., and the lack of adequate mitigation to compensate for proposed impacts to high quality montane wetlands (and fen complex), we believe the project is not in compliance with the Section 404(b)(1) Guidelines, specifically parts 230.10 and 230.11. Accordingly, we recommend the Corp deny this project as proposed or supplement the DEIS for compliance with NEPA and the CWA.

In addition, EPA Region 8 believes the proposed project, as currently proposed, may have substantial and unacceptable adverse impacts on aquatic resources of national importance. Your careful consideration of this matter and the future actions taken are important for protecting the remaining wetland resource base on the Grand Mesa. Thank you for your time and continued attention on this difficult matter. If you have any questions or concerns regarding these comments or recommendations please contact Sarah Fowler of my staff at 303-312-6192 or me at 303-312-6670.

Sincerely,

for Humberto Garcia, Director
Ecosystem Protection Program

Enclosures

Cc: Connie Clementson, USFS, Grand Junction
Charlie Richmond, USFS, Delta
Randy Karstaedt, USFS, Denver
Ron Velarde, CDOW, Grand Junction
Al Phister, USFWS, Grand Junction
John Hranec, CWQCD, Denver
Mark Gilfillan, USACE, Grand Junction
Allen Steinle, USACE, Albuquerque

Table 1

EPA review of this proposed project by Ute Water Conservancy District included the following early coordination efforts, process highlights, and subsequent, site-specific review and comments on the referenced project:

1) an on-site, pre-application meeting (2005) during the scoping process for the Forest Service Draft Environmental Impact Statement (DEIS),
2) two NEPA/Section 404 of the CWA scoping letters (dated 9/8/05 and 12/6/05, respectively),
3) multiple interagency discussions/meetings on project purpose and alternatives with a follow up letter (dated 10/27/06),
4) NEPA/404review and comment on the Forest Service DEIS with an EU-3 rating (dated 9/17/07),
5) notification to the Council on Environmental Quality (CEQ) regarding our intent to work with the lead and cooperating agencies but that the project may result in candidate for referral for resolution (letter dated 9/18/07),
6) coordination with you regarding your agency participation in dispute resolution towards resolution of the DEIS deficiencies (letter dated 12/5/07),
7) review and comment letter on the Forest Service's response to our NEPA letter and rating, with emphasis on alternatives and proposed assessment methodology (dated 3/27/08)
8) mediation sessions initiated 4/2/08 with outcome of agreed goal for an "integrated approach to NEPA and 404 that includes a single EIS (memo dated 5/6/08), and
9) letter to you regarding the Corps disengagement from the interagency meetings for resolving the DEIS deficiencies (4/2/09).